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No. 84-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

ARLINE M. SODERBECK,

Petitioner,

vs.

BURNETT COUNTY, WISCONSIN, ROBERT KELLBERG, INDIVIDUALLY AND AS SHERIFF OF BURNETT COUNTY, LOWELL NELSON, EUGENE WELLMAN AND CARL BRANDENBURG, INDIVIDUALLY AND AS MEMBERS OF THE BURNETT COUNTY BOARD OF SUPERVISORS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Does a State Constitution which says that a County shall never be made responsible for the acts of the Sheriff create a total local governmental immunity against liability for violations of a citizen's basic Federal Constitutional right which occur as official policy, under color of law?

Ruling below: Yes, absent proof the local government, by members of its legislative body, participated in the violation.

2. Does the standard for the award of punitive damages set by this Court in *Smith v. Wade,* 461 U.S. 30 (1983) require proof that the Defendant possessed almost certain knowledge the conduct was wrongful and subject to punishment?

Ruling below: Yes.

THE PARTIES

All six parties are listed in the Caption.

TABLE OF CONTENTS

	Page
Questions Presented	i
The Parties	ii
Table of Contents	iii
Table of Authorities	iv
Opinions Below	1
Jurisdiction	2
Constitutional and Statutory Provisions Involved	2
Statement of the Case	3
Reasons for Granting the Writ	10
I. The Decision Below is in Direct Conflict With Prior Rulings of This Court	11
II. The Seventh Circuit Court of Appeals Has Recognized State-Created Immunity Against Liability of a Local Government for Intentional Deprivation of Rights Guaranteed by the Constitution of the United States	13
III. The Seventh Circuit Court of Appeals has Imposed a Requirement of Certain Knowledge that Conduct is Wrongful and is Subject to Punishment as a Prerequisite for an Award of Punitive Damages	14
Conclusion	16
Appendix A Opinion of the Court of Appeals	A-1
Appendix B Opinion of the District Court	B-1
Appendix C Appellate Brief of Burnett County, Pages 12-15	C-1

TABLE OF AUTHORITIES

Cases:

Elizabeth Brandon, et al v. John D. Holt, No. 83-1622, decided January 21, 1985 ..... 10-11, 12, 13
Hutto v. Finney, 437 U.S. 678 (1978) 11, 12
Monell v. New York City Dept. of Social Services, 436 U.S. 658 (1980) 11, 12, 13
Owen v. City of Independence, Mo., 445 U.S. 622 (1980) 11, 12
Smith v. Wade, 461 U.S. 30 (1983) 11, 14, 15
Allen v. Fidelity Deposit Co. of Maryland, 515 F. Supp. 1185 (S. Car., 1981) 13
Kroes v. Smith, 540 F. Supp. 1295 (E.D. Mich., 1982) 13

Constitution and Statutes:

Article VI, Clause 2, Constitution of the United States 2
First Amendment, Constitution of the United States .. 2
Fourteenth Amendment, Constitution of the United States 3
28 U.S.C. § 1254(1) 2
28 U.S.C. § 1343(3) (4) 3
Article 6, Section 4, Wisconsin Constitution 3

Court Rules:

Rule 16(c), Seventh Circuit Court of Appeals 12

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Arline M. Soderbeck respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this case on January 4, 1985.

OPINIONS BELOW

The opinion of the Court of Appeals is officially reported at 752 F.2d 285 (7th Cir., 1985). The opinion of the District Court is unreported. The two opinions are reprinted in the Appendix.

JURISDICTION

The judgment of the Court of Appeals was entered on January 4, 1985, (Appendix A (hereinafter "App. A")) The judgment of the Trial Court was entered on October 31, 1983, (Appendix B (hereinafter "App. B")). This Court has jurisdiction to review the decision of the Court of Appeals by writ of certiorari pursuant to 28 U.S.C. § 1254(1)

CONSTITUTONAL AND STATUTORY PROVISIONS INVOLVED

The Constitution of the United States, Article VI, Clause 2, provides in pertinent part:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding

The First Amendment to the Constitution of the United States provides:

> *Religious and political freedom.*
>
> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Fourteenth Amendment to the Constitution of the United States, Section 1, provides in pertinent part:

> *Section 1. Citizens of the United States.*
>
> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Wisconsin Constitution, Article 6, Section 4 (repealed) provides in pertinent part:

> . . . [T]he county shall never be made responsible for the acts of the sheriff.

STATEMENT OF THE CASE

This action arose as a result of the employment termination of the Plaintiff for reasons of her marriage, her political associations and the foreclosure of future employment opportunity because of false accusations of criminal conduct, all of which were retaliatory. Jurisdiction of the Federal Court was invoked pursuant to 28 U.S.C. § 1343 (3)(4). It was admitted that the County Sheriff acted in his official capacity and under authority of his office. In pretrial rulings the Trial Court ruled that such acts and edicts of a County Sheriff taken in his official capacity, under color of law, were acts and edicts which establish County policy; and if the jury were to find that the Sheriff violated Plaintiff's constitutional rights, the County would

EDITOR'S NOTE

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be liable. The matter proceeded to jury trial with all parties represented by counsel and the following facts were established.

In 1972 Gerald Soderbeck was elected to the Office of Sheriff of Burnett County, Wisconsin, and assumed his duties about January 2, 1973. He and his spouse, the Plaintiff, Arline Soderbeck, and their children moved into the county-owned structure that served as a combination County Jail, Sheriff's office, and Sheriff's residence.

At the time he assumed his office, the Department was small consisting of three deputies and a part-time radio dispatch system. Mr. Soderbeck began to build that office into a professional, full-time Sheriff's Department which efforts continued until he left office in January, 1979. When he turned the office over to Defendant Robert Kellberg on January 1, 1979, the department could provide 24-hour emergency services to the county: It had full-time radio dispatcher-jailers, about six full-time deputies and a cadre of reserve officers.

Soon after assuming office in 1972, Mr. Soderbeck selected Defendant Robert Kellberg to serve as Undersheriff, a position requiring loyalty, trust and confidence. In 1978, without warning, Mr. Kellberg became a candidate for Sheriff in competition with Mr. Soderbeck resulting in serious tensions between the two of them and culminating in an attempt to suspend Mr. Kellberg. That action was reversed by the Law Enforcement Committee, a committee of three members of the County Board which had legislative jurisdiction over the operations of the county emergency services including the Sheriff's Department.

Between January, 1973, and January, 1975, Arline Soderbeck was employed by Burnett County on a part-

time basis; however, she was also actively seeking permanent full-time employment in areas more consistent with her training and experience as a bookkeeper. In January, 1975, the Burnett County Law Enforcement Committee published in the *Burnett County Sentinel* an advertisement for a permanent full-time job opening as a bookkeeper. Over her husband's objections, Arline Soderbeck applied for that job.

There were many others competing for that position and Mr. Lowell Nelson of the Law Enforcement Committee described the number of applicants as a "bunch of them." There were enough applicants to require the Law Enforcement Committee to meet in special session to consider the merits of each and to make a final selection. The official minutes of the Law Enforcement Committee recites that it met to "study applications for bookkeeper job in Sheriff's Office." After going through those applications, the Law Enforcement Committee "decided that Mrs. Soderbeck was the most eligible person." Thereafter, the Law Enforcement Committee hired Arline Soderbeck as a bookkeeper over the renewed objections of the Sheriff.

Between January, 1975, and January, 1979, Arline Soderbeck competently performed her bookkeeping duties and all errors or mistakes detected in her work were caught and reported by Arline Soderbeck, herself. As time passed, she found that her duties and responsibilities expanded and she had many supervisors. At no time, however, was she ever provided with a written job description or clear-cut set of instructions as to the nature of her employment duties Nor was she ever informed that her position was anything other than "bookkeeper."

Among those duties added to bookkeeper were prisoner

transport, jail matron, jail laundry, care of juveniles, serving jail meals, doing jail dishes, ambulance runs, dispatching, typing police reports, typing investigation reports, recording civil process papers and payroll duties. None of her duties placed her in a relationship closer to the Sheriff than any other employee in the county or Department of Sheriff.

During her entire period of employment as a bookkeeper, Arline Soderbeck was treated as a general county employee and was never given any status, authority or responsibility beyond that described above. She did not have access to files and records to the exclusion of others and was, in fact, denied access to records within the department which other general employees were not. She was not in any position to help formulate policy or procedure, make personnel decisions or recommendations, or do anything that would suggest that her position was in any way closer to the Sheriff than that of any other employee.

She was, however, Gerald Soderbeck's spouse; and in the election year of 1978 she was politically active on his behalf in the fall primaries. There were only three people in the Burnett County Sheriff's Department who supported Gerald Soderbeck in his primary campaign of 1978: Arline Soderbeck; Terry Lundgren, a department criminal investigator; and Tom Johnson, a reserve officer. These are the same people *and the only people* fired by the Sheriff and the Law Enforcement Committee in the first few official hours of the new Sheriff's term of office in January, 1979.

Gerald Soderbeck was defeated in the primary election of 1978 and it was obvious he would not continue as Sher-

iff after January 1, 1979. After the primary, Arline Soderbeck and Terry Lundgren ceased their political activity and devoted their energies to their job. Arline Soderbeck continued to function as bookkeeper and general employee in full anticipation of remaining a county employee after January 1, 1979. She was never informed that her employment status was in any way threatened, nor was she ever informed that her demeanor on the job or her job performance were in any way unacceptable or below standards. Terry Lundgren, however, had reason to believe something was going to happen as a result of a threat from Robert Kellberg for his support of Mr. Soderbeck.

The 1978 general elections resulted in a victory for Mr. Kellberg and he began to make preparations to move into the Sheriff's residence to take up the duties of Sheriff. In preparation for those events, Mr. Kellberg selected Mr. Eugene S. Boyd to serve as Undersheriff. Just before he took office, he had several meetings with Mr. Boyd in the Sheriff's residence. At one of those meetings, Mr. Kellberg told Mr. Boyd he intended to fire Arline Soderbeck because of her politics, not because of any deficiencies in her job performance. On the morning of January 2, 1979, Arline Soderbeck was summarily fired by written order of the Sheriff. Terry Lundgren was present when she read the written order and was also present when she placed a telephone call to Lowell Nelson, Chairman of the Law Enforcement Committee which had hired her. He told her to stay on the job. Mr. Lundgren, a professional criminal investigator, felt something was happening so he immediately drove out to Lowell Nelson's home where he saw Mr. Kellberg and Mr. Nelson in conference.

After Mr. Nelson spoke with Mr. Kellberg, he called

Arline Soderbeck back and told her to "pack her bags and leave." Arline did as she was told to do by the Chairman of the Committee that hired her: She packed her possessions and left the office.

On January 4, 1979, two days later, a regular meeting of the Law Enforcement Committee was scheduled and Arline Soderbeck and Mr. Lundgren appeared to protest their employment termination. The fact that those employment terminations were at issue was public knowledge and attracted the media, particularly the *Burnett County Sentinel*.

At that meeting, four topics came up as to Arline Soderbeck's termination: The reason for her termination; her eligibility for accrued benefits; her potential for future employment with Burnett County; and, finally, questions regarding records from the Sheriff's Department.

Arline Soderbeck and Terry Lundgren turned to the Law Enforcement Committee because that committee exercised great authority, influence and control over the Sheriff and how he ran the Department. That committee was a subbody of the Burnett County Board of Supervisors, a committee of jurisdiction having final authority on all fiscal decisions affecting the Sheriff or his department. In addition to having the fiscal power of control, the Law Enforcement Committee by custom, practice, tradition, course of action and course of inaction exercised significant final control over the Sheriff's personnel decisions; e.g., reversing his disciplinary actions, hiring new employees and allowing the Sheriff to terminate employees because of marriage relationships or partisan political activities.

That meeting was conducted by Mr. Lowell Nelson, its Chairman, and two other members of the Burnett County Board of Supervisors, Mr. Brandenburg and Mr. Wellman.

Mr. Nelson informed both Arline Soderbeck and Terry Lundgren that their employment termination was because of their political activity on behalf of the defeated candidate for Sheriff, Gerald Soderbeck, and, as to Arline Soderbeck, because of her association with Gerald Soderbeck. Those reasons were affirmed by Sheriff Robert Kellberg during the meeting and all three members of the committee unanimously ratified or approved the termination for those reasons. That action was reported in the *Burnett County Sentinel.*

Arline Soderbeck stated that all records were returned to the Sheriff's office and asked about other job opportunities within the county government system. Mr. Lowell Nelson told her she couldn't apply for any other county jobs meaning within Burnett County. Thereafter, a formal action was taken to extend to her vacation benefits and unemployment compensation.

Arline Soderbeck diligently sought other employment, but all she could obtain was a position as a check-out person in a grocery store. As of the date of trial, she worked approximately 30 hours per week at $4.00 per hour without employment benefits.

As of trial date, her economic losses totaled approximately $23,500 with a sustained loss of $6,600 per year.

Prior to trial, the Trial Court ruled Plaintiff would not be allowed to pursue her theories of foreclosure of employment opportunities. The matter was tried before a jury. At the close of Plaintiff's case the three Defendant members of the Law Enforcement Committee were dismissed on Motion for Directed Verdict: however, the County was retained as a Defendant and counsel for the County was required to remain to protect the interests of the County.

At the conclusion of the trial, the jury made specific Findings of Fact and awarded Plaintiff compensatory and punitive damages.

The Defendants brought post-trial motions for Judgment Notwithstanding the Verdict and for an award of costs and attorneys' fees or, alternatively, for a new trial. Judgment Notwithstanding the Verdict was granted as to the punitive damages. The three Defendants dismissed at the close of Plaintiff's case were awarded costs and attorneys' fees in an amount which equals the jury verdict leaving Plaintiff, the prevailing party, with nothing but attorneys' fees and litigation costs in excess of the verdict. Plaintiff appealed from the award of costs and attorneys' fees, the amount thereof and from the decision to eliminate punitive damages. Defendants appealed from the denial of their Motions for Judgment Notwithstanding the Verdict as to liability of the County.

The Court of Appeals sustained the Trial Court on the issue of punitive damages and reversed the dismissal of the three members of the County Board of Supervisors. The Court of Appeals remanded for a new trial on the issue of the liability of the County because the Wisconsin Constitution immunizes the County for tortious conduct of the Sheriff. Plaintiff now appeals to this Court on the issue of the liability of the County for deprivation of Federal Constitutional rights by a County Sheriff and on the issue of punitive damages.

REASONS FOR GRANTING THE WRIT

There are three reasons for granting the writ. First, the decision below conflicts directly with the core of this Court's rulings in *Elizabeth Brandon, et al v. John D.*

Holt, No. 83-1622, decided January 21, 1985; *Monell v. New York City Dept. of Social Services*, 436 U.S 658 (1978); *Hutto v. Finney*, 437 U.S. 678 (1978); and *Owen v. City of Independence, Mo.*, 445 U.S. 622 (1980). Those cases made it clear that a judgment against a public official acting in his official capacity imposes liability on the public entity he or she represented provided that public entity received notice and opportunity to respond. In this case the County was represented by counsel throughout the trial and thus far on these appeals.

Second, the Court of Appeals' ruling below directly established that a state may invoke a state-created immunity as a bar to liability for deprivations of Federally-protected Constitutional rights. That ruling runs directly contrary to the decisions of this Court cited above and subordinates the Federal Constitution to a State Constitution.

Third, the Court of Appeals' decision on the issue of punitive damages conflicts with this Court's decision in *Smith v. Wade*, 461 U.S. 30 (1983) by requiring as a condition for the award of punitive damages that the Defendant "almost certainly knew what he was doing was wrongful and subject to punishment."

I.

THE DECISION BELOW IS IN DIRECT CONFLICT WITH PRIOR RULINGS OF THIS COURT.

This Court's decision in *Elizabeth Brandon, et al v. John D. Holt*, No. 83-1622, decided January 21, 1985, makes it explicitly clear that a judgment against a public official acting in his official capacity imposes liability on the entity that he represents if that entity has had notice and opportunity to defend the claim. In this case the en-

tity (Burnett County) was a named Defendant as were four of its highest elected public officials in both their official and individual capacities.

In repeated rulings the Trial Court held that the acts of the Sheriff taken in his official capacity were the acts of the County. App. B, B-1, B-2. In reaching that conclusion the Trial Court applied the same reasoning and analysis this Court applied in *Brandon,* and rejected the argument that the Wisconsin Constitution immunized the County against liability for Federal constitutional violations committed by its elected Sheriff. App. B, B-1, B-3, B-12. Those rulings became the law of the case; and Plaintiff was not required to put in evidence as to the policy-making authority of the Sheriff, although such evidence does appear in the record.

The Seventh Circuit Court of Appeals reversed the Trial Court and remanded for a new trial on the issue of the liability of the County because such liability depended upon the acts of the County Board members and *not* upon the official acts of the elected Sheriff. App. A, A-15. In so doing, the Court of Appeals rejected the analysis of municipal liability based upon *Monell v. New York City Dept. of Social Services,* 436 U.S. 658 (1978); *Hutto v. Finney,* 437 U.S. 678 (1978); and *Owen v. City of Independence, Mo.,* 445 U.S. 622 (1980). However, the Court of Appeals did not have the benefit of this Court's decision in *Brandon,* which was decided on January 21, 1985. Seventh Circuit Rule 16(c), which is strictly enforced, limits a party's time to petition for rehearing to 14 days from the date of the decision. Therefore, Plaintiff's only remedy is appeal to this Court.

II.

THE SEVENTH CIRCUIT COURT OF APPEALS HAS RECOGNIZED STATE-CREATED IMMUNITY AGAINST LIABILITY OF A LOCAL GOVERNMENT FOR INTENTIONAL DEPRIVATION OF RIGHTS GUARANTEED BY THE CONSTITUTION OF THE UNITED STATES.

At least two other states have similar constitutional or statutory provisions of law which immunize a local unit of government for official conduct of a Sheriff which tramples the federal right of a citizen. Those states are Michigan and South Carolina. The Court of Appeals was apparently persuaded by the County's argument that the reasoning in *Kroes v. Smith,* 540 F. Supp. 1295 (E.D. Mich., 1982) and *Allen v. Fidelity Deposit Co. of Maryland,* 515 F. Supp. 1185 (S. Car., 1981) is the correct application of the law of *Monell.* App. C, C-1, C-4.

That ruling is contrary to the ruling of this Court in *Elizabeth Brandon, et al v. John D. Holt,* No. 83-1622, decided January 21, 1985, and repugnant to the Supremacy Clause, Constitution of the United States, Article VI, Clause 2. The decision below must not be allowed to stand because it creates an avenue for the official subjugation of rights guaranteed by the Federal Constitution by simply having an immune official carry out the tortious conduct.

III.

THE SEVENTH CIRCUIT COURT OF APPEALS HAS IMPOSED A REQUIREMENT OF CERTAIN KNOWLEDGE THAT CONDUCT IS WRONGFUL AND IS SUBJECT TO PUNISHMENT AS A PREREQUISITE FOR AN AWARD OF PUNITIVE DAMAGES.

In this case, the jury made specific Findings of Fact that the Plaintiff was not a confidential employee and had no policy-making responsibility or other sensitive duties. Further, the Plaintiff was fired because of her marriage and her partisan political activities. Less intrusive or drastic measures such as a transfer were never considered.

Based in part upon that type of evidence, the jury found that the conduct of the Sheriff was taken "with reckless indifference to the Plaintiff's rights not to be terminated for her associations or political activity." The Trial Court set aside the award of punitive damages holding that the Defendant must be shown to have knowledge of his wrongful conduct in order to support such award. The Court of Appeals affirmed.

The standard thus set by the Court of Appeals forces a step backwards to the single standard of "intent" rejected by this Court in *Smith v. Wade*, 461 U.S. 30. That standard is that the "Defendant almost certainly knew that what he was doing was wrongful and subject to punishment." App. A, A-10. That is an impossible standard to meet because it again places the claimant in a position of being required to prove a subjective state of mind on the part of the Defendant. This Court has rejected the contention that "intent" be the only touchstone for punitive damages. In so doing this Court recognized that it is the

responsibility of the official to be acquainted with the underlying substantive law.

This Court clearly adopted a standard not dependent upon "intent" or certain knowledge; rather, it is based upon a "reckless or callous" disregard for Plaintiff's rights in addition to intent. However, the Court of Appeals below interpreted the term "reckless or callous indifference" to mean "that the Defendant almost certainly knew that what he was doing was wrongful and subject to punishment." App. A, A-10. If the actor possessed such scienter, intent is there. Consequently, the Court of Appeals has returned to the standard that only intentional conduct will support punitive damages.

Thus, in the Seventh Circuit the requirement for punitive damages is that the Defendant's conduct must be shown to be motivated by evil motive or intent or involve *intentional or knowingly reckless or callous indifference* to the Federally-protected rights of others. That standard is not what this Court had in mind in *Smith v. Wade*.

CONCLUSION

The rulings below threaten to frustrate this Court's efforts to bring order and standards to the issues of the liability of local units of government and for the award of damages for violations of Federally-protected rights. The Seventh Circuit stands alone in disregarding the clear meaning of prior rulings in these areas and has inexplicably imposed an immunity where none exists. These rulings threaten chaos to the efforts of this Court to settle the law of civil rights liability.

Plaintiff respectfully requests the petition for a writ of certiorari to be granted.

March 18, 1985.

Respectfully submitted,

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APPENDIX A

In the
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 83-3161, 84-1437

ARLINE M. SODERBECK,

Plaintiff-Appellant,

v.

BURNETT COUNTY, WISCONSIN: ROBERT KELLBERG, individually and as Sheriff of Burnett County; and LOWELL NELSON, EUGENE WELLMAN, and CARL A. BRANDENBURG,

Defendants-Appellees.

and

No. 83-3232

ARLINE M. SODERBECK,

Plaintiff-Appellee,

v.

BURNETT COUNTY, WISCONSIN, and ROBERT KELLBERG, individually and as Sheriff of Burnett County,

Defendants-Appellants.

Appeals from the United States District Court
for the Western District of Wisconsin.

No. 80 C 513—Barbara Crabb, *Judge*.

ARGUED SEPTEMBER 26, 1984—DECIDED JANUARY 4, 1985

BEFORE CUMMINGS, *Chief Judge,* and POSNER and FLAUM, *Circuit Judges.*

POSNER, *Circuit Judge.* Arline Soderbeck brought this suit under section 1 of the Civil Rights Act of 1871, now 42 U.S.C. § 1983, against Robert Kellberg (the Sheriff of Burnett County, Wisconsin), the three members of the county's Law Enforcement Committee, and the county itself. She alleges that she was fired from her job in the sheriff's office in violation of her rights under the First Amendment, made applicable to state action by the Fourteenth Amendment. She had been hired to work in the sheriff's department when her husband was the sheriff, but Kellberg defeated Soderbeck in a subsequent election for sheriff and the first thing he did on taking office in 1979 was to fire Mrs. Soderbeck. The jury was entitled to find that Kellberg's only reason for firing her was that she was the wife and presumed ally of his political adversary.

At the close of the plaintiff's case in chief, the district judge directed a verdict for the three members of the Law Enforcement Committee; later the judge awarded them attorney's fees of $30,110.62 and costs of $3,061.18. The jury brought in a verdict against the remaining defendants; that is, Sheriff Kellberg and Burnett County, of $33,375 in compensatory damages and $5,000 in punitive damages (the latter against Kellberg only). The judge held that an award of punitive damages was improper in the circumstances, but entered judgment for the compensatory damages that the jury had awarded. The sheriff and

the county have appealed from this judgment, while Mrs. Soderbeck has appealed from the denial of punitive damages, the directed verdict for the members of the Law Enforcement Committee, and the award of attorney's fees to them.

A public agency that fires an employee because of his political beliefs or political affiliations infringes his freedom of speech, see *Branti v. Finkel,* 445 U.S. 507 (1980); *Elrod v. Burns,* 427 U.S. 347 (1976), but there are exceptions to this principle, carved out to minimize its adverse impact on the effective functioning of government. For example, employees at the policy-making level of government can be fired on political grounds. *Id.* at 367-68 (plurality opinion); *Shakman v. Democratic Organization of Cook County,* 722 F.2d 1307, 1309-10 (7th Cir. 1983) (per curiam). Mrs. Soderbeck was not a policy maker; but if, as the defendants argue, she was the sheriff's confidential secretary, then Kellberg could fire her without violating the Constitution. See *Stegmaier v. Trammell,* 597 F.2d 1027, 1038 (5th Cir. 1979) (dictum). You cannot run a government with officials who are forced to keep political enemies as their confidential secretaries, and Mrs. Soderbeck was the political enemy of her husband's political enemy, Kellberg. Any implication of the plurality opinion in *Elrod v. Burns* that only a policy maker is unprotected by the principle announced in that case was superseded by the broader formulation in the majority opinion in *Branti v. Finkel,* which allows an employee to be fired if "the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." 445 U.S. at 518. See also *Livas v. Petka,* 711 F.2d 798, 800-

01 (7th Cir. 1983). It need not be a policy-making office. If Rosalynn Carter had been President Carter's secretary, President Reagan would not have had to keep her on as his secretary.

Mrs. Soderbeck, however, had been trained as a bookkeeper and her title was bookkeeper, not secretary or confidential secretary; and though she did do most of the typing in the sheriff's office, there was evidence that if the sheriff needed something typed he would hand his handwritten draft to whoever in the office was handy. Burnett County has a population of only 12,000 and a tiny sheriff's office whose six employees at the time of Mrs. Soderbeck's termination did not have sharply differentiated tasks; it was only after she was fired that a position of "confidential secretary" was created with a different job description from that of the bookkeeper's position that Mrs. Soderbeck had occupied. So while she did typing and handled legal papers, such as summonses and warrants, the other employees did these things too. She also did janitorial work, and performed domestic chores for the prisoners in the county jail (which is in the same building as the sheriff's office and home) as jail matron and laundress—not the usual functions of a confidential secretary. And she did not take dictation—no one in the office did. If she could be fired as a confidential employee, so could anyone else employed in the office, on the theory that if an office is small enough the tasks usually performed by the boss's personal secretary may be parcelled out among all the employees.

This is not to say that Mrs. Soderbeck was, as a matter of law, an employee who could not be fired because of her political affiliation. It is to say merely that the question

was sufficiently uncertain to be one for the jury to decide. The defendants argue that whether or not an employee exercises a policy-making role or is a repository of confidences that make loyalty an essential part of his job description should always be a question of law, but we cannot agree with this point, for which no authority is offered and which has been rejected in previous cases in this and other circuits. See e.g., *Nekolny v. Painter,* 653 F.2d 1164. 1169 (7th Cir. 1981); *Stegmaier v. Trammell, supra.* 597 F.2d at 1034 n. 8, and cases cited there. Rightly or wrongly, our system commits the decision of complex as well as simple facts, facts tinctured with legal or policy significance (such as negligence) as well as the who-did-what-to-whom facts that can be found without any instruction in the law, to the jury in cases in which a right to a jury trial is given. Maybe some facts are so difficult for laymen to determine that they can be withdrawn from the jury; this is the theory (or rather a theory) of the equity accounting, see, e.g., *Medtronic, Inc. v. Intermedics, Inc.,* 725 F.2d 440, 443 (7th Cir. 1984), and is the basis for the Third Circuit's interesting ruling (on which of course we need take no position here) that trial by jury violates due process of law if the suit "is too complex for a jury to understand and decide rationally." *In re Japanese Electronic Products Antitrust Litigation,* 631 F.2d 1069, 1090 (3d Cir. 1980); contra, *In re U.S. Financial Securities Litigation,* 609 F.2d 411, 431 (9th Cir. 1979); see generally Comment, *Complex Civil Litigation and the Seventh Amendment Right to a Jury Trial,* 51 U. Chi. L. Rev. 581 (1984). But the question whether or not a clerical worker is a policy-making or confidential employee is not of such character.

Although we therefore think the district judge was right not to disturb the jury's verdict of compensatory damages, we also think she was right to rescind the award of punitive damages. This conclusion requires us to resolve a question left unanswered by *Smith v. Wade,* 103 S. Ct. 1625 (1983), where the Supreme Court held that punitive damages will lie for reckless as well as intentional violations of section 1983. The question is whether it is ever necessary to show that the defendant knew he was violating the plaintiff's legal rights.

In a recent section 1983 case we approved an instruction that allowed the jury to award punitive damages if it found the defendant's actions "maliciously or wantonly or oppressively done" and that defined these adverbs as follows: "An act or a failure to act is maliciously done if prompted or accompanied by ill will or spite or grudge either toward the injured person individually or toward all persons in one or more groups or categories of which the injured person is a member"; wantonly done if done in reckless disregard or callous disregard of or indifference to the rights of one or more persons including the injured person"; "oppressively done if done in a way or manner which injures or damages or otherwise violates the rights of another person with unnecessary harshness or severity as by misuse, or abuse of authority, or power, or by taking advantage of some [weakness] or disability or misfortune of another person." *McKinley v. Trattles,* 732 F.2d 1320, 1326 n. 2 (7th Cir. 1984) ("weakness" bracketed in original). This is a standard punitive-damages instruction, see 3 Devitt & Blackmar, Federal Jury Practice and Instructions § 85.11 (3d ed. 1977), which though not tailored to civil-rights cases is commonly used in them, see, e.g., be-

sides *McKinley v. Trattles, Abraham v. Pekarski,* 728 F. 2d 167, 172 n. 2 (3d Cir. 1984). Although the instruction conveys a mood (perhaps none too clearly to the average juror) rather than establishing precise criteria, it does imply distinct types of misconduct—though, as it seems to us, two rather than three. In the first, the defendant actually derives satisfaction from hurting the plaintiff; in the second, the defendant, while not having any particular desire to hurt the plaintiff, tramples on the plaintiff's rights, in a fashion that can fairly be called reckless, to accomplish his own aims. This distinction corresponds to the distinction in the criminal law between deliberate and reckless harm. If a man sets fire to a house intending to kill the occupants, he is a deliberate murderer; if he sets fire to a house he knows to be occupied, but does so to warm himself rather than to kill the occupants, he is a reckless murderer. But he is a murderer in either case, and would be subject to punitive damages in a suit for wrongful death. The distinction between deliberate and reckless wrongdoing is well captured by the Supreme Court's formulation of its holding in *Smith v. Wade:* "We hold that a jury may be permitted to assess punitive damages in an action under § 1983 when the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others." 103 S. Ct. at 1640.

Although there was some evidence in this case of personal spite by Kellberg toward the Soderbecks as well as political rivalry, and spite would bring the case within the first type of conduct for which punitive damages is a proper sanction, the special-verdict form, not challenged by the plaintiff, confined the jury to the second: "In ter-

minating plaintiff Arline Soderbeck's employment with the Burnett County Sheriff's Department, did defendant Robert Kellberg act with reckless indifference to the plaintiff's rights not to be terminated for her associations or political activity?" (It is no doubt regrettable that the instructions to the jury did not define "reckless indifference," cf. *United States v. McAnally*, 666 F.2d 1116, 1119 (7th Cir. 1981); *United States v. Hanlon*, 548 F.2d 1096, 1101-02 (2d Cir. 1977), as the legal meaning of the term is unlikely to be obvious to the average juror; but no complaint was made on that score.) This formulation allowed the jury to award punitive damages even if it found that Kellberg had fired Mrs. Soderbeck not to hurt her but just to make life easier for himself; and the district judge was quite right to hold that the evidence did not permit an award of punitive damages on this basis (that is, on the basis of recklessness).

The difference between deliberate and reckless harm is the difference between wanting to hurt someone and knowing that hurting someone is a highly likely consequence of an act undertaken for a different end. But in the latter case there must be knowledge of the danger that the defendant's act creates, which in this case is a danger of depriving a public employee of her freedom of speech; and the knowledge of this danger presupposes some knowledge of the free-speech rights of public employees.

This point can be made clearer by noting that a primary purpose (we think *the* primary purpose) of punitive damages, both generally and in section 1983 cases, is to deter. See, e.g., *Smith v. Wade, supra*, 103 S.Ct. at 1636, 1639; *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 266-67, 269-70 (1981); Processer and Keeton on the Law

of Torts § 2, at p. 19 (5th ed. 1984). Unless the defendant knew that the conduct which resulted in the injury to the plaintiff was forbidden, an award of punitive damages will have no deterrent effect. This is the basis on which the Supreme Court has created a limited good-faith exception to the exclusionary rule, a rule whose current rationale is a deterrent one. See *United States v. Leon,* 104 S. Ct. 3405, 3412 (1984).

If Kellberg had not fired but instead had arrested Mrs. Soderbeck, without any basis other than antipathy to her political connections, an award of punitive damages would clearly have been appropriate, even if no spite could be shown. Every law-enforcement officer in the United States knows—or had better learn—that the law places limits on the authority of the police. But a police officer in a small rural county, even a police chief or a sheriff, cannot be assumed to know that if he fires, on the most natural of political grounds, a clerical employee whose loyalty he has some reason to regard as a legitimate job qualification, he may be violating the law. His ignorance would not necessarily immunize him from liability for compensatory damages; Kellberg does not even argue that as the law stood when he acted, he could *reasonably* have believed that he was justified in what he did, and therefore is immune from all damage liability. See *Harlow v. Fitzgerald,* 457 U.S. 800, 818-19 (1982). But if we therefore assume that Kellberg should have known that he was not privileged to fire Mrs. Soderbeck, still it would not follow that his ignorance of her rights was reckless; careless is not reckless.

The words used to mark off the domain of punitive damages—words like "maliciously," "wantonly," "oppressively" "spitefully"—indicate that punitive damages, like

criminal fines which they resemble, are reserved for cases where the wrongfulness of the defendant's conduct is conspicuous, implying that its wrongfulness is apparent to the person who engages in it, and not just to a lawyer. If one needed great subtlety to realize that one had strayed into the forbidden zone where punitive damages are a sanction, the deterrent effect of such damages would be distorted. Some people would stray into the zone unknowingly; as to them the threat of punitive damages would not deter. Others would steer far clear of the zone, not knowing where it began; as to them lawful as well as unlawful conduct would be deterred. We may therefore set it down as a condition of awarding punitive damages that the defendant almost certainly knew that what he was doing was wrongful and subject to punishment. Among the types of conduct that fit this description is conduct so contrary to our society's basic ethical principles that it can safely be assumed to have been undertaken with knowledge that it was legally as well as morally wrong, including conduct that has come to be regarded as contrary to the modern civil rights, as well as the older personal liberties, of Americans.

But the discharge of public employees on political grounds is not yet regarded in the light of something contrary to natural law; nor is it widely known in nonlegal circles to be a federal constitutional tort or any other sort of tort. Hence knowledge that it is forbidden cannot automatically be imputed to the individuals responsible for such discharges—especially when the individual is a minor rural official with no legal training. Burnett County in Northwestern Wisconsin cannot be among the more sophisticated of the nation's counties and its sheriff cannot be presumed to be steeped in the arcana of modern con-

stitutional law. *Elrod v. Burns* was decided only three years before Mrs. Soderbeck was fired—over a vigorous dissent of three Justices, and without a majority opinion, which suggests it was something of a novelty. *Branti* was decided after she was fired. Of course knowledge is to some extent a function of the penalties for ignorance; the heavier the sanctions for an unknowing violation of someone's rights, the more will be invested in finding out what rights people have. But if Kellberg had consulted a lawyer, he might well have been advised that he could fire Mrs. Soderbeck because she was a confidential employee; it was an arguable point, though one the jury resolved against him. And this point shows why the maxim, "ignorance of the law is no defense" (on which see Perkins & Boyce, Criminal Law 1029-36 (3d ed. 1982)), is a maxim of criminal law, not of civil law. The requirement of fair notice in criminal cases gives reasonable assurance that the potential violator will know whether his conduct will be unlawful; there is no similar assurance in civil cases, as this case illustrates.

Although the plaintiff was free to present evidence from which a jury might infer that Sheriff Kellberg in fact knew, or circumstanced as he was should certainly have known, that he was violating her federal constitutional rights (as in *Busche v. Burkee*, 649 F.2d 509, 520 (7th Cir. 1981), a good example of a section 1983 case where punitive damages for firing a public employee were upheld), she presented no such evidence. The judge was therefore right to take the issue of punitive damages—defined as we have said in terms of "reckless indifference" to the plaintiff's rights—away from the jury. But in so holding, we wish to make clear that Kellberg's ignorance of Mrs. Soderbeck's

federal rights would not matter if his firing of her had been the kind of act that anyone (or at least any sheriff) would know violated some law. In *Smith v. Wade*, the defendant Smith may not have known that he was violating the Eighth Amendment when he took no steps to protect inmate Wade from being beaten and sexually assaulted; but since Wade had placed himself in protective custody because of prior assaults against him, since another inmate in the same dormitory had recently been beaten to death while Smith was on duty, and since Smith had assigned to Wade's cell an inmate who had recently been punished for fighting, Smith ought to have known he was violating some legal duty of protection toward an inmate in his care. Just as it is not necessary in order to convict a person of a federal crime to prove that he knew the facts that confer federal jurisdiction over the offense, see, e.g., *United States v. Feola*, 420 U.S. 671, 684 (1975); *United States v. Harris*, 729 F.2d 441, 445-46 (7th Cir. 1984), it is not necessary in order to justify awarding punitive damages to show that the defendant ought to have known he was violating the plaintiff's federal rights. The point in both cases is that once the defendant is shown to have engaged in plainly unlawful conduct to require a showing that the defendant knew which sovereign's laws he was violating would simply reduce the deterrent effect of punishment by making it harder to prove a violation.

Burnett County argues that the jury should not have been allowed to find it liable along with Kellberg; that it is immune from liability under section 1983 by virtue of a Wisconsin constitutional provision that was adopted in 1848, well before the Civil Rights Act of 1871 and therefore (or so at least the county argues, by analogy to other

preexisting immunities, such as that for judges, *Pierson v. Ray*, 386 U.S. 547, 553-55 (1967)) implicitly incorporated into the act. The provision (repealed after Mrs. Soderbeck was fired, see Wis. Stat. Ann., Const., Art. 6, § 4 (1984-1985 Pocket Part)) is that "the county shall never be made responsible for the acts of the sheriff." Wis. Const. Art. 6, § 4. It is intended to "spare the county treasury from liability to third parties damaged by the acts of the sheriff," *Bablitch & Bablitch v. Lincoln County*, 82 Wis. 2d 574, 579, 263 N.W.2d 218, 221 (1978), which is to say, derivative liability based on the status of the county as the sheriff's employer. But as this just means *respondeat superior*, it is apparent that the provision is irrelevant to the county's liability under section 1983. Regardless of any preexisting state-law immunities, agencies of state and local government are not liable under section 1983 on a theory of *respondeat superior*, that is, in their capacity as employers of the persons who commit the actual civil rights violation. *Monell v. New York City Department of Social Services*, 436 U.S. 658, 694 (1978). Burnett County is liable if at all to Mrs. Soderbeck only for its own acts, and the provision of the Wisconsin constitution on which the county relies does not purport to immunize counties from liability for their own acts.

The provision is not entirely a red herring in this case, however. Since a county can act only through people, to conclude that a county has violated section 1983 requires deciding whose acts are attributable to the county, and the answer given by the cases is that the acts of the county's policy makers are. See, e.g., *id.* at 694; *Reed v. Village of Shorewood*, 704 F.2d 943, 953 (7th Cir. 1983); *Languirand v. Hayden*, 717 F.2d 220, 227 (5th Cir. 1983).

The immunity provision is powerful evidence that the Sheriff of Burnett County was not a policy-making official of the county at the time he fired Mrs. Soderbeck, but instead was an autonomous official, in much the same way as the Mayor of Chicago is not an official of Cook County. See also *Andreski v. Industrial Comm'n*, 261 Wis. 234, 240, 52 N.W.2d 135, 137 (1952). But we need not pursue this issue, as the plaintiff made no effort to show that the sheriff is a policy-making official of the county government. The basis on which she tried to implicate the county in the sheriff's wrongdoing was different; it was the involvement of the members of the county's Law Enforcement Committee. The governing body of the county is its Board of Supervisors, which operates through committees. The Law Enforcement Committee is one, and it is in charge of the budget for the sheriff's department. Although the committee unquestionably is a policy-making body whose acts are the county's acts for purposes of section 1983, the district judge directed a verdict for the committee members on the ground that the committee had no legal authority to fire Mrs. Soderbeck. If the grant of directed verdict was correct, then Burnett County should be dismissed from the case too, because its liability is derivative from that of the members of the Law Enforcement Committee.

Whether the committee had the authority to fire Mrs. Soderbeck is not the important question. If it fired her without having the authority to do so, this just means it violated state as well as federal law. The important question is whether it participated in her firing. On this the record shows the following. It was the Law Enforcement Committee rather than the sheriff that had hired Mrs. Soder-

beck to work in the sheriff's department; her husband was sheriff at the time and would have had a conflict of interest in hiring his own wife. So when Mrs. Soderbeck learned that Sheriff Kellberg wanted to fire her, naturally she called Lowell Nelson, the chairman of the committee, and asked him what to do. Nelson told her to stay put, but then he called Kellberg and later he called Mrs. Soderbeck back and told her she had better pack her things and leave. Nelson was also seen talking with Kellberg in person before the second phone conversation with her. Mrs. Soderbeck appeared at a public meeting of the committee to protest her firing by Kellberg, but the committee refused to intervene. Whether the committee went further and actually approved the firing was hotly contested, but the jury could have believed that the committee announced at the meeting that it would stand behind the sheriff's decision. There was also testimony that the committee had reversed a suspension by the previous sheriff. As a matter of fact, this was the suspension of Kellberg by Soderbeck, when the latter had been sheriff and the former had been undersheriff and had just announced his candidacy for sheriff at the next election. This was part of the history of animosity between these two that might have allowed a jury to base a judgment for punitive damages on a finding that Kellberg's firing of Mrs. Soderbeck had been motivated by spite—if the punitive-damages issue had been put to the jury on a theory of spite, which, as we said, it was not.

If all Nelson had done was relay to Mrs. Soderbeck Kellberg's decision, taken without consultation with Nelson, to fire her, and if all the committee had done was to turn down her appeal, the members of the committee and therefore the county as well would not be liable under

section 1983. (This is quite apart from the question whether in turning down her appeal the committee would have been acting in a judicial capacity, which would have made the members absolutely immune from liability but would not have excused the county from liability. See *Reed v Village of Shorewood, supra,* 704 F.2d at 953-54.) Failure to take corrective action cannot in and of itself violate section 1983. Otherwise the action of an inferior officer would automatically be attributed up the line to his highest superior and thence to the local government, since the misconduct of policy-making officials (here the members of the Law Enforcement Committee) is attributed to the government. This ladder of liability would be inconsistent with the distinction created by *Monell* between the direct and derivative liability of local government, and with the many lower-court cases that reject the notion that supervisors are strictly liable for their subordinates' violations of section 1983. See, e.g., *Schultz v. Baumgart,* 738 F.2d 231, 238-39 (7th Cir. 1984); *Wolf-Lillie v. Sonquist,* 699 F.2d 864, 869 (7th Cir. 1983). But the jury did not have to find that the committee merely failed to act. Common-sense recognition that the people who control the purse strings are likely to be consulted about what must have been one of the most dramatic personnel issues in Burnett County's history, coupled with the facts that the committee had hired Mrs. Soderbeck, had been involved in another disciplinary matter in the sheriff's department (provided it had not been involved in purely a review capacity), met regularly with the sheriff (he testified that he reports to them), and may actually have approved rather than merely have refused to annul the firing of Mrs. Soderbeck, would have allowed a reasonable jury

to infer that the committee (Nelson in particular) participated in—at least by ratifying, but in any event not just by passively refusing to intervene in—Kellberg's firing of Mrs. Soderbeck. See *Miller v. City of Mission*, 705 F.2d 368, 375-76 (10th Cir. 1983), a factually similar case; *Turpin v. Mailet*, 619 F.2d 196, 200 (2d Cir. 1980); cf. *Rookard v. Health & Hospitals Corp.*, 710 F.2d 41, 45 (2d Cir. 1983).

Since Mrs. Soderbeck has a valid judgment for all her compensatory damages against Sheriff Kellberg, and since our refusal to countenance an award of punitive damages against him applies even more strongly to the county and the members of the Law Enforcement Committee, it may seem academic whether she was entitled to a judgment against these other possible joint tortfeasors; you can collect a judgment (for compensatory damages) only once. See, e.g., *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 348 (1971). But as is evident from the provision of the Wisconsin constitution quoted earlier, the county will not indemnify the sheriff; nor will the state. See Wis. Stat. Ann. § 895.46, comments (1984-1985 Pocket Part). (All this has been changed since this suit was brought, but without effect on the suit. See *id.*, § 895.-46(1), (b).) And the sheriff's bond may have been for as little as $5,000. See Wis. Stat. Ann § 59.13(1) (c). (Maybe the fact that the jury awarded Mrs. Soderbeck $5,000 in punitive damages against Kellberg is more than coincidence.) Kellberg's bond, whatever it was, plus his private means, whatever they are, may not be enough to pay Mrs. Soderbeck's judgment. So her case against the county and the members of the Law Enforcement Committee is not moot, and we hold that the district judge erred in directing

a verdict for the committee's members. And since the county's liability depends critically, as we have seen, on the liability of the members of the Law Enforcement Committee, and the directed verdict prevented the defendants from putting in evidence to rebut the plaintiff's case against the committee, there must be a new trial against all the defendants—except, of course, Kellberg—unless Mrs. Soderbeck is able to collect her judgment in full against him.

If a new trial is held, it will be limited to liability. The amount of compensatory damages has been fixed by the jury's verdict against Kellberg and the county, and there is no basis for imposing punitive damages on the members of the committee. True, in most cases applying the principle that allows a new trial to be limited to liability provided there was no error as to damages and the liability and damage issues are logically distinct (as they are here), the same defendant is involved in both determinations. See, e.g., *Dazenko v. James Hunter Machine Co.*, 393 F.2d 287, 291 and n. 7 (7th Cir. 1968); *Akermanis v. Sea-Land Service, Inc.*, 688 F.2d 898, 906 (2d Cir. 1982); 6A Moore's Federal Practice ¶ 59.06, at p. 59-60 (2d ed. 1984). But the principle ought also to apply when damages are properly assessed against one defendant (or several) and another (who is jointly liable for the same injury to the plaintiff) is incorrectly dismissed from the case *Gallo v. Crocker*, 321 F.2d 876, 879-80 (5th Cir. 1963), so held, noting that Rule 59(a) of the Federal Rules of Civil Procedure allows the granting of a new trial in jury cases "to all or any of the parties and on all or part of the issues." The jury here was asked to determine Mrs. Soderbeck's compensatory damages, and did so. As the

number of defendants in a case of joint liability is—as a matter of legal logic anyway—irrelevant to that determination, she was not prejudiced in a legal sense by having her damages assessed only against two defendants, though conceivably the jury might have been more generous if there had been a third defendant in the picture.

What we have said disposes as well of the last issue in the case, which is whether the district judge should have awarded attorney's fees to the defendants who were dismissed out, that is, the members of the Law Enforcement Committee. Since we hold that these defendants should not have been dismissed from the case, they are not—not yet, anyway—prevailing parties, so they cannot yet be entitled to any award of attorney's fees or costs. But in addition, bearing in mind that an award of attorney's fees to a prevailing defendant in a civil rights case is proper only if the suit can reasonably be described as frivolous, *Hughes v. Rowe*, 449 U.S. 5, 14-15 (1980) (per curiam), we think it obvious that these defendants will not be able to obtain attorney's fees, at least for any proceedings to date Since the plaintiff succeeded in making out a prima facie case against these defendants, that is, a case strong enough to withstand a motion for directed verdict (incorrectly granted by the district judge), the case against them was not frivolous.

To summarize, the award of compensatory damages against defendant Kellberg and the order rescinding the jury's award of punitive damages are affirmed; but the judgments against Burnett County and in favor of the members of its Law Enforcement Committee, along with the award of attorney's fees to those members, are reversed

and the case is remanded for further proceedings consistent with this opinion. Costs in this court shall be awarded to the plaintiff, and Circuit Rule 18 shall not apply on remand.

AFFIRMED IN PART, REVERSED
IN PART, AND REMANDED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

ARLINE M. SODERBECK,

Plaintiff,

v.

BURNETT COUNTY, WISCONSIN; and ROBERT KELLBERG, individually and as sheriff of Burnett County,

Defendants.

ORDER

80-C-513-C

This case is before the court on defendants' motions for judgment notwithstanding the verdict, to alter or amend the judgment or, alternatively, for a new trial. In support of the motions, defendants argue that the jury improperly considered testimony admitted only against one of the defendants who was dismissed from the lawsuit at the close of plaintiff's case; that defendant Burnett County has no liability for the acts of the sheriff; that the record is devoid of any evidence to support an award of punitive damages; that the record is devoid of any evidence to support an award of future damages; and that there is insufficient evidence to support the jury's finding that plaintiff was not a "confidential employee."

Also before the court is the motion for costs and attorneys' fees of the defendants who were dismissed at the

close of plaintiff's case: Lowell Nelson, Carl Brandenburg, and Eugene Wellman.

1. Liability of defendant Burnett County

For the reasons set forth in the decision in *Casey v. Stich,* 79-C-102 (W.D. Wis. Sept. 27, 1982), a copy of which is attached to this order, I continue to hold as I did at trial that the acts of defendant Kellberg in terminating plaintiff's employment are the acts of the county. *See also Reed v. Village of Shorewood,* 704 F.2d 943 (7th Cir. 1983). Therefore, I will deny the county's motions for new trial, or for judgment notwithstanding the verdict, based on the contention that it is not liable for any acts of defendant Kellberg in his official capacity.

2. Reliance on Inadmissible Testimony

In the early stages of the trial, I allowed in testimony of Gary Nelson and Terry Lundgren to the effect that one of the defendants, Lowell Nelson, had admitted in a public statement made at a meeting of the burnett [sic] County Law Enforcement Committee, that plaintiff was fired for political reasons. At the close of plaintiff's case, I granted a directed verdict in favor of Nelson and his fellow members of the Law Enforcement Committee, defendants Brandenburg and Wellman. I instructed the jury that it could not consider Nelson's statement as evidence against defendant Kellberg.

Defendants argue that, even with curative instructions, the admission of this evidence irreparably damaged them, because the jury could not keep separate the claims against defendant Kellberg and the claims against defendant Nel-

son and the other members of the Law Enforcement Committee of the county board. Defendants contend that the jury's verdict proves that the jury considered the inadmissible testimony because it could not have reached the verdict it did without considering it. I disagree. I believe that the jury had sufficient evidence to find that plaintiff's firing was for political reasons. The jury had before it Eugene Boyds' testimony that defendant Kellberg had planned to fire plaintiff even before he took office and the evidence that defendant Kellberg fired the only two people who worked on his opponent's campaign.[1] In addition, the jury may well have been influenced by defendant Kellberg's shift in defense strategy. At the beginning of the trial, defendants took the position that plaintiff had been discharged for wrongful acts or, at the least, for suspicion of wrongful acts. As the trial progressed, defendants appeared to discard this position and emphasize, instead, the confidential nature of plaintiff's position. The abandonment of the first position may have led the jurors to see it as a pretext, leaving them to draw the natural inference that the defendants offered it only to hide the real reason for plaintiff's firing: her involvement in her husband's campaign.

Defendants argue that plaintiff's counsel's reference to defendant Nelson's statement during closing argument underscores the prejudice they suffered by plaintiff's use of this inadmissible evidence. However, I do not recall de-

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[1]Defendants point out, correctly, that these two persons were the only persons defendant Kellberg could fire, because they were the only two sheriff's department employees who were not protected by a union contract. This fact does not preclude a finding that the firings were politically motivated.

fendants' counsel raising an objection to the reference at the time and I believe that any such reference was cured by the instruction that followed promptly after the closing arguments, directing the jury not to consider any statement by Lowell Nelson as evidence against the remaining defendants.[2] The presumption is that the jury followed the instructions it was given. As to this ground, defendants' motion for new trial or for an amended verdict or judgment notwithstanding the verdict will be denied.

3. Sufficiency of the Evidence

Defendants argue that there was a lack of evidence from which a reasonable jury could have found reasonably that plaintiff was not a confidential employee. They point to the testimony of Marlys Lindahl, plaintiff's successor as secretary in the sheriff's department, and to plaintiff's own statement of her duties as evidence that the secretary's job was a position in which the sheriff was entitled to have total trust and confidence.

I remain convinced that the question whether plaintiff was a confidential employee was a question of fact for the jury, *see, e.g., Stegmaier v. Trammel,* 597 F.2d 1207, 1034 n. 8 (5th Cir. 1979) and that the jury could have

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[2]It is troubling to note that plaintiff's counsel does not yet appear to see that once Lowell Nelson was dismissed as a defendant, any testimony about Lowell Nelson's statements was inadmissible. In his brief in opposition to defendants' motions for new trial or judgment notwithstanding the verdict, plaintiff's counsel argues that the court should consider the testimony of Terry Lundgren and Gary Nelson about what went on at the public meeting of the Law Enforcement Committee. Plaintiff's counsel forgets that the only point to Lundberg's and Nelson's testimony was their recounting of Lowell Nelson's statement, which was inadmissible against defendants Kellberg and Burnett County.

found reasonably that plaintiff was not such an employee. It is true that plaintiff handled tasks which in some offices might be considered confidential in nature, but the defendants did not establish that those tasks were confidential in the particular circumstances of the Burnett County Sheriff's Department. Indeed, from the evidence at trial, the jury may well have gained the impression of a small office in which the employees performed many different roles, in which very little information was not known to everyone in the office, and in which there was no reason to keep any information from anyone in the office. Defendant Kellberg did little to rebut that impression or to show how and why it would have been a problem for him to have kept plaintiff as a secretary. Marlys Lindahl's testimony about her duties as the incumbent secretary showed the manner in which she was employed, but failed to persuade the jury that plaintiff would have been utilized in the same manner. In fact, plaintiff had testified that when she was hired, it was as a bookkeeper, not as a secretary.

In their arguments now and at trial defendants seem to assume that the jury would have a basic understanding of the need for confidentiality in the position of sheriff's secretary. The reality is that the jurors did not come to the trial with any such understanding and defendants simply did not put in enough evidence to persuade them of the point. It may be that defendant Kellberg held the sincere belief that he needed the undivided loyalty of the person who served as his secretary in the department, and therefore could fire his predecessor's secretary as a matter

of course,[3] but in his testimony defendant Kellberg neither conveyed that point nor explained specifically why, as the wife of the former sheriff, plaintiff would not have been effective as defendant Kellberg's secretary.

Having failed to convince the jury of the confidential nature of plaintiff's job and the sheriff's need to fill it with a person he could trust and rely upon, defendants were left with little to rebut the plaintiff's evidence that she had not acted as a confidential secretary to her husband when he was sheriff, but had done bookkeeping and secretarial work for several persons in the sheriff's office in addition to her husband; and that she had no involvement in policy-making and no access to any information that was not also accessible to others in the department. I am persuaded that plaintiff's evidence on this issue was sufficient to support the jury's findings that plaintiff was not a confidential employee.

4. Punitive Damages

An award of punitive damages must be supported by findings that the defendant's actions were motivated by evil motive or intent, or reckless or callous indifference to the federally protected rights of the plaintiff. *Smith v. Wade*, —— U.S. ——, 51 U.S.L.W. 4407 (April 19, 1983). Defendants argue that no such findings could rea-

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[3]In *Elrod v. Burns*, 427 U.S. 347 (1976), the United States Supreme Court held that it was an infringement of the First Amendment to fire public employees on a partisan political basis. Most courts have read the opinions in that case in which there was no majority opinion, as holding that a policymaking, confidential employee can be discharged from a job solely on the ground of political beliefs or associations without violating the First Amendment. *See, e.g., Stegmaier v. Trammell*, 597 F.2d 1027 (5th Cir. 1979).

sonably have been made by the jury. Plaintiff argues that the jury's award of punitive damages is supported by the testimony of Eugene Boyd that before defendant Kellberg took office, he had planned to fire plaintiff; Lundgren's and Gary Nelson's testimony that defendant Lowell Nelson had said plaintiff's firing was for political reasons; and the evidence that defendant Kellberg did not try to find plaintiff another position in the sheriff's department.

Because the Lundgren and Gary Nelson testimony is inadmissible, the question becomes whether defendant Kellberg's plan to fire plaintiff as soon as he took office and his failure to try to find her another job are evidence of "that entire want of care which would raise the presumption of a conscious indifference to consequences." *Milwaukee & St. Paul R. Co. v. Arms,* 91 U.S. 489, 495 (1875), quoted in *Smith v. Wade,* 51 U.S.L.W. at 4411.

In its opinion in *Smith,* the Supreme Court acknowledged the difficulty of describing with precision that conduct which justifies an award of punitive damages; specifically, what degree of negligence, recklessness, or culpable indifference must be shown. *Id.* at 4413. In this case, there is at issue an intentional act (the firing), which makes the determination of recklessness somewhat more difficult.

I believe that in determining what plaintiff must show to establish reckless indifference to her rights, the focus must be on what defendant Kellberg knew or should have known about his legal obligation to plaintiff. Obviously there was nothing reckless about the act of firing plaintiff; defendant Kellberg did that deliberately and with forethought. Certainly it is not the manner of firing that is to be considered; that is, if defendant Kellberg had taken plaintiff out to lunch to explain his decision to terminate her, or had

tried to find her another job, he might have made a better impression upon her, but neither of those acts would affect the constitutionality of his decision to fire her or the propriety of an award of punitive damages against him for doing so.

I conclude that to show "reckless indifference," plaintiff must show that defendant Kellberg went ahead with plaintiff's firing when he knew or should have known that plaintiff was not a confidential employee, and, therefore, that it would be unconstitutional to fire her. To hold otherwise would be to hold that the mere fact of a firing later found to be unconstitutional would support an award of punitive damages.[4]

This approach is consistent with the purpose of punitive damages. It is the "deterrence of future *egregious* conduct [that] is a primary purpose of both [42 U.S.C.] §1983 and of punitive damages." *Smith v. Wade,* 51 U.S.L.W. at 4412 (citations omitted; emphasis added). Where the standard for actionability is unclear, as it was in the circumstances of this case, the prospect of punitive damages would not deter unlawful conduct; it would serve only to deter public employees from acting at all.

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[4]In *Crawford v. Garnier,* No. 80-2323, decided Sept. 26, 1983 (7th Cir.), the court of appeals held that the jury could have reasonably inferred malice from the fact that "defendant acted peremptorily and arbitrarily [in firing plaintiff] when he learned of plaintiff's magazine article. . . ." Slip op. at 12. However, in that case, defendant fired plaintiff immediately upon learning of an article critical of an employment program under defendant's supervision. The circumstances were such that defendant could be charged with having known, or being in a position where he should have known, that firing plaintiff was an unconstitutional act. Thus, Garnier could be held liable for punitive damages under the standard proposed above.

In this case, plaintiff has shown no more than that defendant fire her intentionally and, as the jury found, for improper reasons. She has not shown that defendant Kellberg knew or should have reasonably been expected to know that it was improper for him to fire her. As of January 1, 1979, the date of plaintiff's firing, *Elrod v. Burns*, 427 U.S. 347 (1976) had been the law for over two years. Defendant Kellberg can be held to have known that it was illegal to fire a nonconfidential, non-policymaking public employee for political reason, but he could not have been expected to know that plaintiff was not a confidential employee since her employment status was, and still is, a hotly-disputed issue on which reasonable persons may differ.

I conclude that, because there was no evidence to support a finding that defendant Kellberg should have known that plaintiff would be held to be a non-confidential employee, exempt from the *Elrod* exclusion, the jury could not reasonably have found that defendant Kellberg acted with reckless indifference to plaintiff's First Amendment rights. I erred in permitting this question to be submitted to the jury. As to this claim, defendant Kellberg's motion for judgment notwithstanding the verdict will be granted.

5. Future Damages

Defendants contend that the jury erred in awarding plaintiff the equivalent of what she would have earned if she were to have been reinstated in the sheriff's department immediately following the trial and were to work there one year. They argue that as an employee terminable

at will, plaintiff had no legitimate expectation of working a full year at the sheriff's department, even if she were reinstated.

In my opinion, the jury's award is a reasonable accommodation of the fact that plaintiff had no guarantee of working for the sheriff for as long as she liked and of the fact that she had been wronged by the act of the sheriff.

6. Past Wage Loss

Defendants argue that the jury's award of past wage loss should be reduced by half because she had chosen to work half-time. The evidence was not clear that plaintiff's half-time work was by choice rather than imposed upon her. There was evidence that plaintiff had made attempts to seek more lucrative employment and had been unsuccessful. Taking this evidence into account, the jury could have found reasonably that plaintiff had incurred a wage loss of $20,350.

7. Costs and Attorneys' Fees

The defendants dismissed at the close of plaintiff's case seek an award of costs and attorneys' fees. Because they are prevailing parties, these defendants are entitled to costs as a matter of course. Rule 54(d), Federal Rules of Civil Procedure. *Delta Air Lines, Inc. v. Colbert*, 692 F.2d 489 (7th Cir. 1982). However, it will be necessary for them to submit a statement separating those costs for which they seek reimbursement from those that are the obligation of defendants Kellberg and Burnett County.[5]

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[5]Where the cost was incurred on behalf of all five defendants, these three defendants can claim reimbursement for three-fifths of the cost.

With respect to their claim for attorneys' fees, defendants argue that such an award is justified when the plaintiff's case is clearly frivolous, unreasonable, and without foundation. *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 422 (1978). They assert that plaintiff's case against them as just that; that plaintiff had no foundation for her allegation that defendants conspired with defendant Kellberg to terminate plaintiff's employment without due process of law, or for her allegation that defendants terminated her employment illegally and in violation of her First Amendment rights, or for her allegation that defendant Nelson slandered her.

Defendants are correct in asserting that there was no foundation for plaintiff's claims against them. The law is clear that only the sheriff had the authority to terminate plaintiff's employment with the sheriff's department. Whatever the members of the Law Enforcement Committee thought about defendant Kellberg's decision, they were powerless to overrule it—or to bring it about had defendant Kellberg not gone ahead with it.

The claim of denial of a hearing was equally groundless. It was clear that plaintiff had no liberty or property interest in her job;[6] thus, she was not entitled to any due process hearing. Had she been entitled to such a hearing, it would not have been the duty of the Law Enforcement

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[6]Plaintiff had no employment contract, no expectation of continued employment rooted in state law, policies, or customs, and she was not a member of the union. Therefore, she had no cognizable property interest her job. She tried to show that she had a liberty interest that was activated when defendants released derogatory information about her. However, the information had never been disseminated before it was disclosed at a deposition taken on plaintiff's behalf in preparation for the trial of this case. In such circumstances, the release of the information did not implicate a liberty interest.

Committee to provide it, because the committee had no authority to override the sheriff's action.

Plaintiff's claim that defendant Nelson slandered her does not raise a federal question. *Paul v. Davis,* 424 U.S. 693 (1976). Since plaintiff did not assert pendent jurisdiction over this claim, there was no legal basis for pursuing it in this action. And, as discovery demonstrated, there was no factual basis for the claim. Plaintiff was unable to prove that any derogatory information was released except in connection with the litigation, in which circumstances it was privileged.

The allegation of conspiracy adds nothing to plaintiff's claims against the defendants. It is the acts causing damage to plaintiff that give rise to liability for damages, not the fact of conspiracy. *Hostrop v. Board of Jurnior* [sic] *College Dist. No. 515,* 523 F.2d 569, 576 (7th Cir. 1975). Since defendants did not do anything to plaintiff or fail to perform a duty to plaintiff, it is irrelevant whether they conspired about something.

Plaintiff has not suggested that there was a reasonable basis for her claims against these defendants. In her brief, she asserts only that "Facts in the record suggest that these defendants were involved in activities that violated plaintiff's Constitutional rights." She does not say what those facts might be or what kinds of constitutional violations they might suggest. Minimal research should have disclosed to plaintiff's counsel that these defendants could not be held liable for plaintiff's termination or for any failure to provide her with a pre- or post-termination hearing. To maintain this action against them after plaintiff knew or should have known it was baseless was unreasonable and a ground for an award of attorneys' fees.

Making such an award in this case will not chill the bringing of legitimate claims or "inhibit earnest advocacy or undecided issues," *United States Steel Corp. v. United States,* 519 F.2d 359, 364 (3d Cir. 1975); the liability of these defendants was not an undecided issues, or one that was unclear. It does not seem unfair that persons who are sued on the ground that they took actions in violation of a constitutional provision or law whose requirements they are charged with knowing should be permitted to collect the costs of defending themselves from a plaintiff who maintains a lawsuit against them in the face of adverse laws and facts about which she should have known.

ORDER

IT IS ORDERED that

1) the motions of defendant Burnett County for a new trial or for judgment notwithstanding the verdict are DENIED;

2) the motions of defendant Kellberg for a new trial or for judgment notwithstanding the verdict or for amendment of the verdict are DENIED, except with respect to special verdict questions numbers 5 and 6; with respect to question number 5, the answer "yes" is amended to read "no," and with respect to question number 6, the answer is deleted; and

3) the motions of defendants Nelson, Brandenburg, and Wellman for costs and for attorneys' fees are GRANTED; these defendants may have until November 15, 1983, in which to submit an amended bill of costs, and an itemized claim for attorneys' fees. Plaintiff may

have until November 29, 1983, in which to file and serve objections to the amounts claimed by these defendants as their share of costs and attorneys' fees. Defendants may have until December 9, 1983, in which to serve and file their reply to plaintiff's objections.

Entered this 31st day of October, 1983.

BY THE COURT:

/s/ Barbara B. Crabb
District Judge

STEPHEN M. CASEY,

Plaintiff,

v.

PERCY STICH, individually and as sheriff of Grant County, Wisconsin; DON MLEZIVA, individually and as Childrens Services supervisor Grant County Department of Social Services; COUNTY OF GRANT, a municipal corporation; WILLIAM FILLBACH, individually and as sheriff of Crawford County, Wisconsin; and COUNTY OF CRAWFORD, a municipal corporation,

Defendants.

ORDER

79-C-102

This is a civil action for money damages brought under 42 U.S C. §1983 and its jurisdictional counterpart, 28 U.S.C. §1343. Plaintiff contends that defendants deprived

him of his constitutional right of due process by helping his former wife remove their son from the state of Wisconsin without notice or hearing. Presently before the court are the motions of defendant Crawford County and defendant Fillbach for summary judgment.

I find there is no genuine dispute with respect to the material facts set forth in the following paragraphs.

FACTS

Plaintiff and his son Dylan Casey lived with a woman named Pat Fish near Millville, Wisconsin which is located in Grant County, Wisconsin.

Plaintiff and his estranged wife, Mary Casey, were in the midst of a divorce proceeding in the state of Pennsylvania when the acts complained of occurred.

On October 6, 1977, Mary Casey appeared at the Crawford County Sheriff's Department and asked defendant Fillbach, the Crawford County sheriff, to assist in locating her son Dylan. Mary Casey told defendant Fillbach about the Pennsylvania divorce proceeding and stated that she had lawful custody of Dylan.

Defendant Fillbach told Mary Casey that plaintiff resided in Grant County. At her request, defendant Fillbach contacted the sheriff of Grant County, defendant Stich, and arranged a meeting between Mary Casey and defendand Stich at a cafe located in Grant County. Defendant Fillbach took Mary Casey to the meeting site.

Defendant Stich asked defendant Fillbach for permission to use the offices of the Crawford County Sheriff's Department as a place to hold a meeting between plaintiff and Mary Casey. Defendant Fillbach agreed to the use of the offices.

Defendants Stich and Fillbach, along with Mary Casey, proceeded to the home of plaintiff in Grant County, where they found Pat Fish and Dylan Casey. Plaintiff was not present. Defendants Stich and Fillbach took Pat Fish, and Mary and Dylan Casey to the offices of the Crawford County Sheriff's Department, where Fish, Dylan and Mary Casey remained while defendants Stich and Fillbach located plaintiff at his place of employment in Crawford County. The sheriffs asked plaintiff to return to the Crawford County Sheriff's Department offices to meet with Mary Casey, which plaintiff agreed to do, claiming he had legal custody of Dylan. The meeting took place, and plaintiff and Mary Casey argued over which of them had proper legal custody of Dylan.

After a telephone call made by defendant Stich to persons in Pennsylvania regarding the divorce and custody dispute, Dylan Casey was placed in the custody of the Grant County Department of Social Services which, in turn, placed Dylan in a foster home. The following day, October 7, 1977, Mary Casey took Dylan Casey and left the state.

Neither before Dylan's removal from plaintiff's home nor before his removal from the state by Mary Casey was any hearing held to determine which of his parents had legal custody of him.

OPINION

Plaintiff's §1983 cause of action against defendant Crawford County proceeds from the assumption that as county sheriff, defendant Fillbach is a high-ranking county official whose actions can be fairly character-

ized as representing county policy.[1] This theory tracks language from *Monell v. City of New York Department of Social Services*, 436 U.S. 658, 694 (1978), in which the Court held that a municipality may be sued under §1983 for constitutional torts arising out of an action taken or policy made by the municipality's "lawmakers or by those whose edicts or acts may fairly be said to represent official policy."[2]

Monell recognized that a municipal entity, like a private corporation, can act only through its employees, and that municipal policies and customs derive from the actions of these employees. In several decisions subsequent to *Monell*, courts have acknowledged that every municipality has certain high-ranking officials who have the final authority on particular matters and that when these individuals act, their actions are deemed official policy which can be imputed directly to the municipality; that is, they *are* the municipality in these matters. *Cf. Quinn v. Syracuse Model Neighborhood Corp.*, 613 F.2d 438 (2d Cir. 1980), where the mayor's actions were imputed to the municipality; *Goss v. San Jacinto Junior College*, 588 F.2d 96, *modified*, 595 F.2d 1119 (5th Cir. 1979), holding a state college liable for the college president's decision to fire plaintiff; *Katris v. City of Waukegan*, 498 F. Supp.

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[1]Plaintiff does not allege that defendant Crawford County specifically enacted an ordinance or resolution endorsing the sheriff's acts or directing him to act as he did, including cooperating with the neighboring county's sheriff's department. In fact, the sheriff's authority for such interagency cooperation is found in Wis. Stats. §§59.24, 66.305 and 66.315.

[2]*See Schnapper, Civil Rights Litigation After Monell*, 79 Colum. L. Rev. 213, 217-219, for a comprehensive analysis of this aspect of the *Monell* doctrine.

48 (N.D. III. 1980), implicating a municipality for the mayor's acts in denying plaintiff a liquor license, although the mayor's authority for granting or denying liquor licenses had been delegated by the common council; and, finally, *Williams v. Codd,* 459 F. Supp. 304 (S.D.N.Y. 1978), in which allegations that the highest-ranking officials of the city police department conspired to deprive plaintiff of his due process rights were sufficient to withstand the police department's motion to dismiss.

Defendant Crawford County contends that under Wisconsin law the sheriff can never stand in the county's shoes. It bolsters this contention by reference to Article VI, section 4 of the Wisconsin Constitution which states that "the county shall never be made responsible for the acts of the sheriff,"[3] and by citations to Wisconsin case law which regularly interprets this constitutional provision to reflect the state's concern that the county treasury be spared financial responsibility to third parties damaged by the acts of the sheriff, because the sheriff is an inde-

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[3]Wisconsin Constitution Article VI, section 4 reads more fully:

> Sheriffs . . . and all other county officers except judicial officers and chief executive officers, shall be chosen by the electors of the respective counties once in every two years. . . . Sheriffs shall hold no other office; they may be required by law to renew their security from time to time, and in default of giving such new security their office shall be deemed vacant, *but the county shall never be made responsible for the acts of the sheriff.* The governor may remove any officer in this section mentioned, giving to such a copy of the charges against him and an opportunity of being heard in his defense. All vacancies shall be filled by appointment, and the person appointed to fill a vacancy shall hold only for the unexpired portion of the term to which he shall be appointed and until his successor shall be elected and qualified. [Emphasis added.]

pendent elected officer, *e.g., Bablitch & Bablitch v. Lincoln County,* 82 Wis.2d 574, 579 (1978).[4]

As further reinforcement for its position, defendant county relies on *Allen v. Fidelity & Deposit Co. of Maryland.* 515 F. Supp. 1185, 1189-91 (D.S.C. 1981), in which the district court decided that the county could not be held liable under §1983 for the acts of deputy sheriffs because state law made the sheriff, not the county, the final arbiter of sheriff's department policy. To hold otherwise, the court said, would be to authorize unlimited raids on the county treasury, a result which South Carolina law had sought to prevent by fixing responsibility on the sheriff. In a subsequent decision, a district court in Michigan applied a state constitutional provision almost identical to Wisconsin's to reach the same conclusion as in *Allen.* The court stated that, with an exception not relevant here, the county could never be made responsible for the acts of the deputy sheriffs because the deputies are accountable only to the sheriff. *Kroes v. Smith,* 540 F. Supp. 1295 (E.D. Mich. 1982).

Although the instant case involves the direct actions of the sheriff rather than his deputies, this distinction would only strengthen the defendant's argument if I were to follow the reasoning of the *Allen* and *Kroes* decisions. However, my view of *Monell* as applied to the undisputed facts of this case leads to the opposite conclusion that the sheriff is a high-ranking county official whose acts may

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[4]In *Bablitch,* the court did note the inconsistency between the policy represented by this 1848 constitutional provision and current public policy which is to indemnify all other public officials against third party claims resulting from the officer's official acts. *See, e.g.,* Wis. Stats. §895.46(1). *Bablitch & Bablitch v. Lincoln County,* 82 Wis. 2d 574, 579 (1978).

be fairly characterized as representing official county policy.

The pertinent Wisconsin constitutional provision can be viewed in one of two ways: either it creates an office of sheriff distinct from county government, or it offers an otherwise liable county immunity from financial responsibility for the sheriff's actions. If the sheriff's office is not part of county government, then the county cannot be held accountable for the sheriff's acts or policies. However, if the reality is that the sheriff is a county official, then the Wisconsin Constitution merely provides the county with immunity from financial responsibility for the sheriff's acts. In the latter instance, the immunity might not apply in a lawsuit brought pursuant to 42 U.S.C. §1983, because it is federal, not state, law that controls the issue of immunity in §1983 actions. *Owens v. City of Independence*, 445 U.S. 622, 647 n. 30 (1980); *Jaworski v. Schmidt*, 684 F.2d 498 (7th Cir. 1982).

The key question is whether the office of sheriff is a hybrid county-state beast, or a branch of county government. Because the parties did not anticipate that this would be an issue, and consequently did not address it in their briefs, I will permit them an opportunity for supplemental briefing. My own tentative view is that the sheriff is a branch of county government. The sheriff's jurisdiction is the county limits and the sheriff is elected by county voters. The fact that no other county official exercises control over the sheriff confirms the view that the sheriff's actions are those of the county in matters of law enforcement.

> Within the field of his responsibility for the maintenance of law and order the sheriff today retains his ancient character and is accountable only to the

> sovereign, the voters of his county, though he may be removed by the governor for cause. No other county official supervises his work or can require a report or an accounting from him concerning his performance of his duty. He chooses his own ways and means of performing it. He divides his time according to his own judgment of what is necessary and desirable but is always subject to call and is eternally charged with maintaining the peace of the county and the apprehension of those who break it. In the performance of this duty he is detective and patrolman, as well as executive and administrator, and he is emphatically one of those who may serve though they only stand and wait. We recite these qualities and characteristics of the office not because they are novel but because they are so old that they are easily forgotten or unappreciated.

Andreslei v. Industrial Comm., 261 Wis. 234, 250 (1952), quoted in *Professional Police Ass'n v. Dane County*, 106 Wis.2d 303, 314 (1982).

A review of the statutes supports the position that the sheriff is a county official. The statutes describing the duties, pay, and arming of sheriffs and appointment of deputies are all located within the chapter of the Wisconsin Statutes entitled "Counties." *See*, for example, §59.23, sheriff; duties; §59.24, peace maintenance; powers and duties of peace officers ("Sheriffs and their undersheriffs and deputies shall keep and preserve the peace *in their respective counties*. . . ."); §59.25, Arming sheriffs ("The county board of any county may furnish its sheriff, undersheriff and deputy sheriffs with the necessary

arms, ammunition, gas bombs and gas sticks for the carrying out of their respective duties, such arms, ammunition, gas bombs and gas sticks to remain the property of the county."); §59.31, Fees, how paid (fees to which sheriffs are entitled for attendance upon a court are to be paid out of the county treasury); §59.21, Sheriff; undersheriff; deputies (by ordinance a county board may fix the number of deputy sheriffs to be appointed and fix the salary of such deputies). *See also* Wis. Stats. §§59.22, 59.25, 59.26, 59.28, 59.29, 59.30, 59.32 and 59.33.

If I find and conclude that the sheriff's office is part of county government, I would interpret Article VI, section 4 of the Wisconsin Constitution as offering the county immunity from financial responsibility for the sheriff's actions. At that point it would become necessary to address the question whether such county immunity

> was so firmly rooted in the common law and was supported by such strong policy reasons that "Congress would have specifically so provided had it wished to abolish the doctrine." *Pierson v. Ray,* 386 U.S. 547, 555 (1967).

Owen v. City of Independence, 445 U.S. at 637. Although on its face the Civil Rights Act of 1871 admits of nc immunities, certain common law immunities which existed prior to the Act may survive if th y are compatible with the purposes of the legislation. Prosecutorial and judicial immunity are two examples of such immunities. *See, e.g., Pierson v. Ray,* 386 U.S. 547 (1967); *Imbler v. Pachtman,* 424 U.S. 409 (1976); *United States of America ex rel Powell v. Irving,* 684 F.2d 494 (7th Cir. 1982).

In *Allen v. Fidelity & Deposit Co. of Maryland,* 515 F. Supp. 1185, the district court concluded that the South Carolina constitutional provision provided an immunity which meets these standards. The court found that the state constitutional provision was an established, long-standing precedent which predated the Civil Rights Act, and that it was consistent with the Act because Congress could not have intended a county to be made liable for the actions of an officer over whom it had no control.

The Wisconsin constitutional provision is an equally well-established precedent which also predates the enactment of the Civil Rights Act. However, I do not share the view of the district court in South Carolina that the provision is compatible with the Civil Rights Act. I believe that the conclusion reached by the court in *Allen,* 515 F. Supp at 1191, that it is unfair to subject the county to liability for the acts of an official it does not control, derives from a faulty premise that county liability attaches only when it can be shown that the county's legislative body exercised supervisory control over or delegated the original authority to the high ranking official.

Under *Monell,* county liability under §1983 is not limited to the acts of the county's lawmakers; it extends as well to those whose actions can be fairly characterized as official policy. If an individual county official has the final authority in a particular area, as the sheriff does in the area of county law enforcement, this is sufficient to trigger county liability.

Moreover, county control cannot be equated with county board control. Ultimately, county government is controlled by the county electorate. Thus, when the sheriff acts, he or she acts with the mandate received from the county voters,

and county "control" is present in the voting booth. There is nothing inherently unfair in requiring county taxpayers to pay the bill for the unconstitutional acts of a sheriff for whom they voted and in whom they vested the great powers of this ancient office.[5]

This result would comport with the Court's conclusion in *Owen*, 445 U.S. at 657:

> We believe that today's decision [imposing liability upon the City of Independence for the unconstitutional acts of its City Manager and City Council members], together with prior precedents in this area, properly allocates these costs among the three principals in the scenario of the §1983 cause of action: the victim of the constitutional deprivation; the officer whose conduct caused the injury; and the public, as represented by the municipal entity. The innocent individual who is harmed by an abuse of governmental authority is assured that he will be compensated for his injury. The offending official, so long as he conducts himself in good faith, may go about his business secure in the knowledge that a qualified immunity will protect him from personal liability for damages that are more appropriately chargeable to the populace as a whole. And the public will be forced to bear only the costs of injury inflicted by the "execution of a government's policy or custom,

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[5]There might be the concern of unlimited raids on the county treasury voiced by the court in *Allen v. Fidelity & Deposit Co. of Maryland*, 515 F. Supp. 1185 (D.S.C. 1981), if punitive damages were available to an injured plaintiff; however, *Newport v. Facts Concerts, Inc.*, 453 U.S. 247 (1981) has put that fear to rest. The county's potential exposure under 42 U.S.C. §1983 is limited to compensatory damages and attorneys' fees.

whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy."

Defendant Crawford County's motion for summary judgment will neither be granted nor denied at this time. A decision on the motion is deferred until the parties have had an opportunity for additional briefing.

Defendants Crawford County and Fillbach next ask the court to decide that the events of October 6, 1977 are distinct from the events of October 7, 1977. The significance of this request derives from the defendants' theory that if the court agrees that the events of each date are separate and distinct, the court can decide as a matter of law that defendants are not liable because neither defendant was a participant in the events of October 7, 1977, the day on which Dylan Casey was removed from the state by his mother.

It is undisputed that on October 6, 1977, defendants Fillbach and Stitch, acting as the sheriffs of their respective counties, directed plaintiff, his son Dylan, and Pat Fish to the Crawford County Sheriff's Department offices to meet with Mary Casey; that at the conclusion of the meeting, Dylan was placed in a foster home overseen by the Grant County Department of Social Services; and that on October 7, 1977, Mary Casey took custody of Dylan without a hearing and left the state. At this stage of the lawsuit, however, I cannot agree with defendants' basic assumption that the October 6 events are separate and distinct from the October 7 events. It is at least as plausible to view the events of October 6 and 7, 1977 as a continuum. Moreover, it was on October 6, 1977 that plaintiff first

lost physical custody of his child, and there remains a question of fact as to what extent, if at all, the acts of these defendants contributed to Dylan's removal from the state. Accordingly, summary judgment is inappropriate and the motion will be denied.

Finally, defendant Fillbach moves for summary judgment because he asserts that at all times he was acting in good faith. The availability of the good faith defense turns on the objective reasonableness of the official's conduct: "[G]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person should have known." *Harlow v. Fitzgerald*, —— U.S. ——, 102 S. Ct. 2727 (1982). On a motion for summary judgment the inquiry centers on the objective reasonableness of an official's conduct, measured by reference to clearly established and applicable law.

Wis. Stats. §48.19 clearly defines the circumstances under which a child may be taken into custody; for example, subsection (1)(d)(5) of §48.19 provides for removal of a child who is ill. It is not apparent whether any of the statutorily enumerated circumstances were present when defendant Fillbach went to plaintiff's home and escorted Pat Fish and Dylan Casey to the offices of the Crawford County Sheriff Department. There is some suggestion that Dylan Casey had a bad cold and a bump on his head when defendant Fillbach arrived at plaintiff's house, but it cannot be determined at this stage whether this condition or any other circumstance warranted Dylan's removal from his father's home. On the present record, it would appear that defendant Fillbach's original involve-

ment in the matter stemmed from Mary Casey's allegation that she had the legal right to custody of Dylan, not from an allegation of child abuse.

Finally, even if defendant Fillbach can successfully prove at trial that he acted in good faith, defendant Crawford County may still be subject to liability for his actions. A municipality cannot assert the good faith defense of its officers in a §1983 action. *Owen v. City of Independence* 445 U.S. 622.

ORDER

IT IS ORDERED that

1) defendant Fillbach's motion for summary judgment is DENIED; and

2) a decision on defendant Crawford County's motion for summary judgment is deferred until the parties have served and filed briefs on the question of the sheriff's status as a county official. The parties are to observe the following briefing schedule:

Defendants' briefs are to be served and filed no later than October 12, 1982.

Plaintiff's brief is to be served and filed no later than October 26, 1982.

There will be no reply brief. The parties are to consider and address the need for the development of a factual record at trial on the question of the sheriff's status.

Entered this 27th day of September, 1982.

BY THE COURT:

/s/ Barbara B. Crabb
District Judge

APPENDIX C

APPELLATE BRIEF OF BURNETT COUNTY, PAGES 12-15

* * *

D. The Trial Court's position Is The Minority Position.

The trial court, relying on its order in *Casey v. Stich, supra,* held that the sheriff's acts constitute the acts of the county. The Court concluded in *Casey, supra,* that "the sheriff is a high-ranking county official whose acts may be fairly characterized as representing official policy." *Id.*, at 5. However, the position taken by Judge Crabb is the minority position.

In two recent cases directly on point, federal courts have held that constitutional provisions, such as the provision at issue here, immunize the county from damages incurred for a sheriff's violations of § 1983. *Kroes v. Smith,* 540 F. Supp. 1295 (E.D. Mich. 1982); and *Allen v. Fidelity & Deposit Co. of Maryland,* 515 F. Supp. 1185 (S. Car. 1981).

Michigan's constitutional provisions at issue in *Kroes, supra,* closely parallel Wisconsin's. "The sheriff may be required by law to renew his security periodically and in default of giving such security, his office shall be vacant. *The county shall never be responsible for his acts . . .*" Michigan Constitution, Article VII, § 6 (1963) (quoted in *Kroes, supra,* at 1297; emphasis added by the Court). The requirement for security found in Michigan's constitution has its counterpart in WIS. STAT. § 59.13. Michigan's provision that the county shall never be responsible for the sheriff's acts is found in the provisions of Wisconsin's con-

stitution, discussed above. In *Kroes,* the court found that the office of sheriff was made independent from the rest of county government and held that the sheriff—not the county, established the policies and customs of the sheriff's department. Therefore, under *Monell, supra,* the county was not liable for the sheriff's § 1983 violations.

In reaching its holding, the Michigan Federal District Court held that the "law in Michigan makes it clear that the sheriff of a given county is the only official with direct control over the duties, responsibilities, and methods of operation of deputy sheriffs." *Kroes, supra,* at 1298. That same principle has been recognized by Wisconsin's Supreme Court:

> Within the field of his responsibility for the maintenance of law and order the sheriff today retains his ancient character and is accountable only to the sovereign, the voters of his county, though he may be removed by the governor for cause. No other county official supervises his work or can require a report or an accounting from him concerning his performance of his duty. He chooses his own ways and means of performing it. He divides his time according to his own judgment . . ." *Andreski v. Industrial Commission,* 261 Wis. 234, 250 (1952) (quoted with approval in *Professional Police Association v. Dane County,* 106 Wis.2d 303, 314, 316 N.W.2d 656 (1982)).

Thus, *Kroes* stands for strong authority that, under provisions of law contained in Wisconsin's constitution and statutes, there can be no liability on the part of the county for the acts of the sheriff. The county could only be liable

under a concept of *respondeat superior,* and such liability was strictly prohibited by the United States Supreme Court in *Monell, supra.*

In *Allen v. Fidelity, supra,* the South Carolina Federal District Court also recognizes the unique role of the county sheriff. The court in *Allen, supra,* reasoned, *inter alia,* that because the county could exercise no supervisory function or control over the sheriff or his deputies, the county was relieved of its responsibilities for the sheriff or his deputies in the performance of their official duties.

The *Allen* court also recognizes that the independence of the sheriff was entrenched in the common law prior to the enactment of § 1983. The South Carolina District Court held that the rationale underlying the separation between the sheriff and county was compatible with the Civil Rights Act of 1871, and that therefore § 1983 incorporated the longstanding immunity of the county under the principles announced in *Owens v. City of Independence, Mo.,* 445 U.S. 622 100 S. Ct. 1398, 63 L.Ed.2d 673 (1980). *Allen,* supra, at 1191.

In Wisconsin, the constitutional provision that "the county shall never be made responsible for the acts of the sheriff" was part of Wisconsin's original constitution, adopted at an election held March 13, 1948. W.S.A. Vol. I, p. 17, 35, 36. Thus, Wisconsin's common-law and constitutional provisions predate the Civil Rights Act of 1871. Moreover, as shown by *Kroes* and *Allen, supra* such provisions were common in state constitutions before the adoption of § 1983. Therefore, under the principles of *Owens v. City of Independence, Mo., supra,* § 1983 incorporates the immunity enjoyed by the county for acts of its sheriff

For these reasons, the trial court erred in holding that the county was liable for the acts of the sheriff. The county cannot be held liable for the acts of its sheriff. Rather, the sheriff, and his constitutionally and statutorily mandated sureties, are liable to the plaintiff for the damages she sustained. The trial court erred in denying Burnett County's motion for judgment notwithstanding the verdict, or, alternatively, for a new trial.

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